

Chapter highlights

- **Purpose:** This chapter contains general policies applicable to the procurement of IT goods and services.
- **Key points:**
 - Under Virginia law, the presumption is that all documents in the possession of any public body or public official and all meetings of state and local public bodies are open to citizens of the Commonwealth.
 - The *Code of Virginia* prohibits discrimination based on race, religion, color, sex, age, disability, or national origin in procurement transactions as well as discrimination against ex-offenders, small, women-, minority- and service-disabled veteran-owned businesses and faith-based organizations.
 - Placing multiple orders to one or more suppliers for the same, like or related goods or services in order to avoid having to utilize the appropriate method of procurement or to remain within delegated procurement authority or to avoid competition is prohibited.

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10.0 Introduction

These policies are applicable to all procurements of IT goods and services and were developed to clarify and implement the various provisions and requirements of the Virginia Public Procurement Act and the *Code of Virginia* pertaining to IT procurement.

10.1 Freedom of Information Act

Under Virginia law, the presumption is that all documents in the possession of any public body or public official and all meetings of state and local public bodies are open to citizens of the Commonwealth. The Virginia Freedom of Information Act (FOIA) (§§[2.2-3700](#) et seq. of the *Code of Virginia*) guarantees citizens of the Commonwealth and representatives of the media access to public records held by public bodies, public officials and public employees. The purpose of FOIA is to promote an increased awareness of all persons of governmental activities. FOIA requires that the law be interpreted liberally, in favor of access, and that any exemption allowing public records to be withheld be interpreted narrowly. VITA requires all IT procurement professionals to comply with the Commonwealth's FOIA requirements found at: [Freedom of Information Advisory Council](#) and

their own agency's policies and procedures. VITA SCM procurement professionals must follow the current SCM process and procedures.

10.2 Confidentiality

Confidentiality of all information utilized in the procurement process is very important to ensure fair and open competition for suppliers competing for Commonwealth contracts. All information and documentation relative to the development of a solicitation or contractual document for a proposed procurement is confidential. These records will not be open to public inspection until completion of the procurement process. All information and documentation relative to the development of a specification or requirements document is confidential until the procurement process is completed. All trade secret information provided in response to an IFB or RFP will remain confidential until contract award. Refer to chapter 5, Ethics in Public Procurement ([insert link](#)), for more information and for a VITA-approved Confidentiality and Conflict of Interest Statement form for use by VITA SCM.

10.3 Section 508

10.3.1 Overview

As specified in [2.2-2012](#)(A) of the *Code of Virginia*, procurement of all IT and telecommunications goods and services must be made in accordance with the electronic and information technology accessibility standards of the Rehabilitation Act of 1973 (29 U.S.C. §794(d)).

Section 508 refers to a statutory section in the Rehabilitation Act of 1973 (found at 20 U.S.C. 794d). The primary purpose of Section 508 is to provide access to and use of government electronic and information technology (EIT) by individual with disabilities. Section 508 requires federal agencies to ensure that their procurement of electronic and information technology takes into account the needs of all end users – including people with disabilities. The statutory language of section 508 is available online by accessing <http://www.section508.gov>.

Section 508 enhances the ability of federal employees with disabilities to have access to and use of information and data that is comparable to that provided by others. EIT products include products that store, process, transmit, convert, duplicate, or receive electronic information. Examples of included products are copiers, computers, fax machines, information kiosks, software, operating systems, websites and telecommunications products.

Section 508 requires that, when agencies develop, procure, maintain or use information technology, (1) individuals with disabilities who are employees have access to and use of information and data that is comparable to the access to and use of the information and data by employees who are not individuals with disabilities; and (2) individuals with disabilities who are members of the public seeking information or services from an agency to have access to and use of information and data that is comparable to the access to and use of the information and data by such members of the public who are not individuals with disabilities. Comparable access is not required if it would impose an undue burden on an agency. The law is not limited to assistive technologies used by people with disabilities, but applies to the development, procurement, maintenance, or use of all electronic and information technologies.

10.3.2 VITA's authority to promulgate regulations pertaining to Section 508

VITA has statutory authority to promulgate regulations to ensure that all procurements of information technology and telecommunications goods and services of every description

meet the electronic and information technology accessibility standards of the Rehabilitation Act of 1973 (29 U.S.C. §794d), as amended.

In order to maintain maximum flexibility for the Commonwealth and in light of the ever-changing information technology market, VITA has chosen to implement the electronic and information technology accessibility standards of Section 508 through policy. VITA is committed to ensuring that all procurements of information technology and telecommunications goods and services purchased by VITA or on behalf of other state agencies meet, to the greatest extent possible, the electronic and information technology accessibility standards of Section 508. Refer to VITA's IT accessibility compliance websites for detailed guidance at: [IT Accessibility Standards](#), [Web Site Standards](#), [Web Site Guidelines](#) and [Information Technology Accessibility Compliance](#). Also, refer to [ITRM Standard GOV103-00](#), or as amended, and [VITA Training Section 508](#).

10.3.3 Section 508 standards

Section 508 standards are technical specifications and performance-based requirements which focus on the functional capabilities covered by technologies. These standards are organized into six sections:

- Software applications and operating systems
- Web-based intranet and internet information and applications
- Telecommunications goods and services
- Video and multimedia goods and services
- Self-contained, closed goods and services
- Desktop and portable computers

Section 508 affects what the Commonwealth acquires (i.e. the requirements development process) but not how the information technology is acquired (source selection). Section 508 applies to both goods and services. Section 508 does not require suppliers to manufacture EIT products that meet the Architectural and Transportation Barriers Compliance Board ("the Access Board"), standards. However, by requiring the federal government to purchase EIT products that meet the Access Board's standards, Section 508 provides an incentive for EIT manufacturers and designers to ensure that their products are usable by people with disabilities.

10.3.4 Defining requirements under Section 508

When developing requirements for any IT procurement, the agency should be familiar with Section 508 requirements and determine which technical provisions apply to the IT goods or services being procured. In addition, market research should be performed to determine the availability of products and services that meet the applicable technical provisions. The agency should determine if Section 508 products or services are available in the marketplace or if the product or service would be eligible for an exception such as non-availability or undue burden.

10.3.5 IT Procurements not applicable to Section 508

Section 508 does not apply to all IT goods and services which may be procured for the Commonwealth or public bodies. These exemptions may apply:

- Built-in assistive technology is not required where it is not needed. Section 508 does not require that every EIT product to be fully accessible for persons with disabilities. Products such as desktop computers do not have to have refreshable Braille displays, but must be compatible with refreshable Braille displays so that a blind individual can use the agency's standard workstation if needed as a reasonable accommodation.

- Undue burden. Agencies do not have to procure EIT products that satisfy the Section 508 standards if doing so would create an undue burden on the agency. “Undue burden” generally means “significant difficulty or expense.” If an agency invokes the undue burden exception, Section 508 requires that information and data be provided to individuals with disabilities by an alternative means of access. Agencies should not alter their technical requirements to comply with Section 508 if the alteration would result in the agency procuring IT that did not meet its needs.
- Non-availability. This refers to circumstances where no Section 508 commercial items are available to meet the agency’s IT procurement needs.

10.3.6 Section 508 exception

All IT goods and services procured by the Commonwealth must comply with the accessibility standards of Section 508. The one exception to IT accessibility is if the state agency submits a written explanation of why, and to what extent, the standards impose an undue burden or exception. All contracts for IT goods and/or services should contain the term and condition which requires that any goods or services provided by the contractor under the contract are Section 508-compliant.

10.3.7 Suggested solicitation language to ensure Section 508 compliance

The following statement is recommended: “All electronic and information technology (EIT) procured through this Request for Proposal (or Invitation for Bid) must meet the applicable accessibility standards of Section 508 of the Rehabilitation Act of 1973, as amended, and is viewable at the following URL: <http://www.section508.gov>.”

10.3.8 Suggested contractual language to ensure Section 508 compliance

Contracts signed with hardware or software suppliers should contain the provision set forth below or substantially similar language: “Supplier hereby warrants that the products or services to be provided under this agreement comply with the accessibility requirements of section 508 of the Rehabilitation Act of 1973, as amended (29 USC §794d), and its implementing regulations set forth at Title 36, Code of Federal Regulations, part 1194. Supplier agrees to promptly respond to and resolve any complaint regarding accessibility of its products or services which is brought to its attention. Supplier further agrees to indemnify and hold harmless the Commonwealth of Virginia or any agency thereof using the supplier’s products or services from any claim arising out of its failure to comply with the aforesaid requirements. Failure to comply with these requirements shall constitute a breach and be grounds for termination of this agreement.” This language puts the burden and expense of Section 508 compliance on the supplier supplying IT goods and services to the Commonwealth.

10.4 Technology access clause

10.4.1 Overview

As required by the Information Technology Access Act (§[2.2-3500](#) et seq. of the *Code of Virginia*), all contracts for the procurement of information technology by, or for the use of, state agencies and institutions shall include the technology access clause which requires compliance with the non-visual access standards established in §[2.2-3503](#) (B).

10.4.2 Procurement requirements

The technology access clause specified in clause (iii) of § [2.2-3502](#) of the *Code of Virginia* shall be developed by the Secretary of Technology and shall require compliance with the nonvisual access standards established in subsection B of §[2.2-3503](#). The clause shall be included in all future contracts for the procurement of information technology by, or for the use of, entities covered by this chapter on or after the effective date of this chapter.

At a minimum, the nonvisual access standards shall include the following: (i) the effective, interactive control and use of the technology (including the operating system), applications programs, and format of the data presented, shall be readily achievable by nonvisual means; (ii) the technology equipped for nonvisual access shall be compatible with information technology used by other individuals with whom the blind or visually impaired individual interacts; (iii) nonvisual access technology shall be integrated into networks used to share communications among employees, program participants, and the public; and (iv) the technology for nonvisual access shall have the capability of providing equivalent access by nonvisual means to telecommunications or other interconnected network services used by persons who are not blind or visually impaired. A covered entity may stipulate additional specifications in any procurement.

Compliance with the nonvisual access standards shall not be required if the head of a covered entity determines that (i) the information technology is not available with nonvisual access because the essential elements of the information technology are visual and (ii) nonvisual equivalence is not available. Visit these VITA websites: [IT Accessibility Standards](#), [Web Site Standards](#), [Web Site Guidelines](#) and [Information Technology Accessibility Compliance](#) for more detailed guidance.

10.4.3 Exceptions to nonvisual access standards

Compliance with the nonvisual access standards shall not be required if the head of the procuring agency determines that (i) the information technology is not available with nonvisual access because the essential elements of the information technology are visual and (ii) nonvisual equivalence is not available.

10.5 Discrimination prohibited

The *Code of Virginia* prohibits discrimination based on race, religion, color, sex, age, disability, or national origin in procurement transactions as well as discrimination against ex-offenders, small, women and minority-owned businesses and faith-based organizations. All businesses and citizens are to have equal access to the Commonwealth's procurement opportunities.

10.5.1 Small, women-owned, minority-owned and service-disabled veteran-owned businesses

As specified in § [2.2-4310](#) (A) of the *Code of Virginia*, public bodies are prohibited from discriminating against a bidder or offeror based on race, religion, color, sex, national origin, age, disability or any other basis prohibited by state law relating to discrimination in employment.

10.5.2 Ex-offenders

In the solicitation or awarding of contracts, no agency shall discriminate against a bidder or offeror because the bidder or offeror employs ex-offenders unless the state agency, department or institution has made a written determination that employing ex-offenders on the specific contract is not in its best interest.

10.5.3 Faith-based organizations

§[2.2-4343.1](#) of the *Code of Virginia* provides that agencies may enter into contracts with faith-based organizations on the same basis as any other nongovernmental source without impairing the religious character of such organization, and without diminishing the religious freedom of the beneficiaries of assistance provided under this section. For the purposes of §2.2-4343.1, "faith-based organization" means a religious organization that is or applies to be a contractor to provide goods or services for programs funded by the block grant

provided pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193. Agencies in procuring IT goods or services or in making disbursements pursuant to this section, shall not (i) discriminate against a faith-based organization on the basis of the organization's religious character or (ii) impose conditions that (a) restrict the religious character of the faith-based organization, except as provided in subsection F, or (b) impair, diminish, or discourage the exercise of religious freedom by the recipients of such goods, services, or disbursements.

All public bodies shall ensure that all invitations to bid, requests for proposals, contracts, and purchase orders prominently display a nondiscrimination statement indicating that the public body does not discriminate against faith-based organizations.

10.6 Posting IT solicitations and awards

All IT solicitations, addenda and notices of award (including emergency and sole source awards) for IT goods and services over \$50,000 shall be posted on [eVA](#) . When a solicitation is cancelled or amended, the notice of cancellation or amendment must be publicly posted on eVA. Written solicitation notices up to \$50,000 are not required to be posted. Invitation for Bids (IFBs) notices over \$50,000 may be also published in a newspaper of general circulation for ten (10) days prior to the date for receipt of bids.

When an RFP is issued for an amount in excess of \$50,000, the solicitation shall be posted on eVA for at least 10 days and shall be published in a newspaper of general circulation in the area in which the contract is to be performed. If the RFP is cancelled or amended, a copy of the cancellation notice or addendum must be publicly posted on [eVA](#).

Award notices for all IT contracts in excess of \$50,000 must be posted for ten (10) days following the date of the award.

Emergency contract awards must state that the contract is being issued on an emergency basis. Sole source awards must state that only one source was determined to be practically available. Both emergency and sole source award postings should state what is being procured, the contractor selected, and the date on which the contract was or will be awarded. All award notices shall be posted on [eVA](#) for ten days following the date of the award.

10.8 Subsequent/additional bid or proposal for same procurement

A supplier who submits a subsequent bid or proposal that is not specifically identified as an amendment to a previously submitted bid or proposal, shall be treated as having submitted a new bid/proposal in response to the original solicitation.

10.9 Prohibited participation

§ [2.2-4373](#) of the *Code of Virginia* provides the following regarding participation in bid preparation and limitation on submitting bid for same procurement: "No person who, for compensation, prepares an invitation to bid or request for proposal for or on behalf of a public body shall (i) submit a bid or proposal for that procurement or any portion thereof or (ii) disclose to any bidder or offeror information concerning the procurement that is not available to the public. However, a public body may permit such person to submit a bid or proposal for that procurement or any portion thereof if the public body determines that the exclusion of the person would limit the number of potential qualified bidders or offerors in a manner contrary to the best interests of the public body."

10.10 Contract and purchase order modification restrictions

A contract or purchase order may not be renewed, extended or otherwise modified unless provided for in the original contract. The contract price may not be increased nor additional consideration given because of a contract renewal or extension unless such increase is specifically authorized under the original contract. As provided in § [2.2-4309](#) of the *Code of Virginia*, no fixed price contract may be increased by more than 25% of the original amount of the contract or \$50,000, whichever is greater, without the advance written approval of the Governor or his designee.

10.11 Contract pricing

As provided in [§2.2-4331](#) of the *Code of Virginia*, VITA may award IT contracts on a fixed price or cost reimbursement basis, or on any other basis that is not prohibited by this section with the following exceptions: "Except in case of emergency affecting the public health, safety or welfare, no public contract shall be awarded on the basis of cost plus a percentage of cost. A policy or contract for insurance or prepaid coverage having a premium computed on the basis of claims paid or incurred, plus the insurance carrier's administrative costs and retention stated in whole or in part as a percentage of such claims, shall not be prohibited."

10.12 Order splitting prohibition

Placing multiple orders to one or more suppliers for the same IT goods or services in order to avoid conducting a competitive procurement or to purchase such items to remain within an agency's delegated procurement authority limit is prohibited.

10.13 Prohibited contracts

The *Code of Virginia* prohibits the Commonwealth from entering into certain types of contracts and to contract with individuals or businesses who have defaulted on some obligation to the Commonwealth. These prohibitions are as follows:

[§2.2 -4331](#) of the *Code of Virginia* provides that no contract shall be awarded by the Commonwealth on the basis of cost plus a percentage of cost except in the case of emergency affecting the public health, safety or welfare. Contracts may be awarded on a fixed price or cost reimbursement basis, or any other basis that is not prohibited.

[§2.2 -4321.1](#) of the *Code of Virginia* prohibits agencies from contracting with any supplier or affiliate of the supplier who:

- Fails or refuses to collect and remit sales tax
- Fails or refused to remit any tax due unless the supplier has entered into a payment agreement with the Department of Taxation to pay the tax and is not delinquent under the terms of the agreement or has appealed the assessment of the tax and the appeal is pending. The determination of whether a source is a prohibited source shall be made by the Department of Taxation after providing the prohibited source with notice and an opportunity to respond to the proposed determination. The Department of Taxation shall notify the Department of General Services of its determination.

Agencies may contract with these sources in the event of an emergency or if contractor is the sole source of needed goods and services.

10.14 VITA's core terms and conditions for public contracts

A complete list of VITA's core terms and conditions is available at: [VITA Core Terms and Conditions](#). The terms and conditions at this .url are subject to change according to legislative updates. Users are urged to ensure current version.

10.14.1 Employment discrimination by contractor prohibited

As stated in [§2.2-4311](#) of the *Code of Virginia*, all public bodies shall include in every contract of more than \$10,000 the following provisions:

"1. During the performance of this contract, the contractor agrees as follows:

- a. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor.
- b. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
- c. The contractor, in all solicitations or advertisements for employees placed by or on behalf of the contractor, will state that such contractor is an equal opportunity employer.

Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.

2.The contractor will include the provisions of the foregoing paragraphs a, b and c in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor."

10.14.2 Drug-free workplace to be maintained by contractor

[§2.2-4312](#) specifies that "all public bodies shall include in every contract over \$10,000 the following provisions:

During the performance of this contract, the contractor agrees to (i) provide a drug-free workplace for the contractor's employees; (ii) post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the contractor's workplace and specifying the actions that will be taken against employees for violations of such prohibition; (iii) state in all solicitations or advertisements for employees placed by or on behalf of the contractor that the contractor maintains a drug-free workplace; and (iv) include the provisions of the foregoing clauses in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

For the purposes of this section, 'drug-free workplace' means a site for the performance of work done in connection with a specific contract awarded to a contractor in accordance with this chapter, the employees of whom are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of the contract."

10.14.3 Payment clauses

Any contract awarded by any state agency, or any contract awarded by any agency of local government in accordance with [§ 2.2-4354](#), shall include:

- “A payment clause that obligates the contractor to take one of the two following actions within seven days after receipt of amounts paid to the contractor by the state agency or local government for work performed by the subcontractor under that contract:
 - Pay the subcontractor for the proportionate share of the total payment received from the agency attributable to the work performed by the subcontractor under that contract; or
 - Notify the agency and subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.
- A payment clause that requires (i) individual contractors to provide their social security numbers and (ii) proprietorships, partnerships, and corporations to provide their federal employer identification numbers.
- An interest clause that obligates the contractor to pay interest to the subcontractor on all amounts owed by the contractor that remain unpaid after seven days following receipt by the contractor of payment from the state agency or agency of local government for work performed by the subcontractor under that contract, except for amounts withheld as allowed in subdivision 1.
- An interest rate clause stating, "Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of one percent per month."

Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor. A contractor's obligation to pay an interest charge to a subcontractor pursuant to the payment clause in this section shall not be construed to be an obligation of the state agency or agency of local government. A contract modification shall not be made for the purpose of providing reimbursement for the interest charge. A cost reimbursement claim shall not include any amount for reimbursement for the interest charge."

10.14.4 Insurance

Contractors are required to have current workers' compensation, employer's liability, commercial general liability and automobile liability insurance policies when work is to be performed on state owned or leased property or facilities. In certain types of IT service contracts and to mitigate certain risks, professional liability/errors and omissions insurance coverage is also required. The Commonwealth of Virginia must be named as an additional insured when requiring a contractor to obtain commercial general liability coverage.

In some cases, workers' compensation insurance and employer's liability insurance may not be required. Workers' compensation insurance is required when the contractor has three (3) or more employees. If work is performed by a sole proprietor, the person does not need workers' compensation insurance, as they do not have employees.

Employer's Liability Insurance is required if an employer has employees who are paid a wage or salary. Employer's liability insurance is not required for persons in business together, e.g., husband and wife, siblings or parents and children, as these persons would be considered owners not employees.

All agreed upon and statutorily mandated insurance must be obtained by the supplier prior to commencing work and must be maintained during the entire term of the contract. Documentation confirming the contractor's insurance shall be included in the procurement file.

10.15 Computer equipment performance specifications

[§2.2-2012](#) (C) of the *Code of Virginia* provides that if VITA, or any agency or institution authorized by VITA, elects to procure personal computers and related peripheral equipment pursuant to any type of blanket purchasing arrangement under which public bodies, as defined in [§ 2.2-4301](#), it may purchase such goods from any supplier following competitive procurement but without the conduct of an individual procurement by or for the using agency or institution, and that it shall establish performance-based specifications for the selection of equipment. Establishment of such contracts shall emphasize performance criteria including price, quality, and delivery without regard to "brand name." All suppliers meeting the Commonwealth's performance requirements shall be afforded the opportunity to compete for such contracts.

10.16 Taxes

10.16.1 Excise tax

The Commonwealth of Virginia is generally exempt from paying federal excise taxes.

10.16.2 State sales tax

The Commonwealth of Virginia is generally exempt from paying Virginia's sales taxes on purchases of tangible personal property for its use or consumption. Agencies may receive requests for a tax exemption certificate or exemption number. When taxes are improperly included on the face of a bid, the bidder will be given the opportunity to delete them.

Requests for exemptions from state sales taxes should be routed to:

scminfo@vita.virginia.gov.

10.16.3 Sales and use tax for state government and political subdivisions

Virginia's sales and use tax does not apply to sales of tangible personal property to the Commonwealth of Virginia or to its political subdivisions, for their use or consumption, if the purchases are pursuant to required official purchase orders to be paid for out of public funds. The tax applies when such sales are made without the required purchase orders and are not paid for out of public funds. No exemption is provided for state or local government employee purchases of meals or lodging whether purchases are pursuant to required official purchase orders or not.

10.16.4 Sales and use tax for contractors

Persons who contract with the Commonwealth or its political subdivisions to perform an IT service and in providing the service also provide some tangible personal property are the consumers of such property and are not entitled to a sales or use tax exemption. This is true even though title to the property provided may pass to the Commonwealth and/or the supplier may be fully and directly reimbursed by the government.

10.17 Commodity codes

The list of commodity codes for IT products and services is posted on the VITA web site [VITA Commodity List of IT Goods & Services](#).

10.18 Freight

Freight and delivery charges shall be included in the pricing schedule, if needed, in all bids and proposals. When necessary, freight and delivery charges are used in the evaluation and award and should be clearly reflected on all documentation in the procurement file. By signing an IFB, suppliers certify that the bid prices offered for F.O.B destination include only the actual freight rate costs at the lowest available rate and such charges are based upon the actual weight of the goods to be shipped.

- **F.O.B. destination.** – F.O.B. destination literally means “free on board.” It is the place at which ownership (title) of the goods passes to the buyer and usually, but not always, the point at which the buyer is responsible for the shipping costs. F.O.B. destination means that all freight charges are paid by the supplier who owns and assumes all risk for the goods until they are accepted by the Commonwealth at the designated delivery point. Unless there is a specific finding that F.O.B. destination is not appropriate for a particular IT procurement, F.O.B. destination is the Commonwealth’s preferred method of freight. The cost of shipping the goods may be included in the quoted price or by the bidder or offeror as a separate line item.
- **F.O.B. origin** – Under F.O.B. origin, the supplier is required to select the most economical method of shipment consistent with the required delivery date. The supplier will prepay the freight charge and add it to the invoice. Regardless of the F.O.B. point, the Commonwealth accepts title only when goods are received. Under F.O.B. origin, the total cost for freight to destination, shipping and handling charges shall be included in determining the lowest responsive and responsible bidder. The cost of the freight, shipping and/or handling should be reflected as a line item on the purchase order.

In the table below, the first entry (F.O.B. destination) is the most beneficial to the Commonwealth, while the others increase the expense and risk to the state. Remember that when ownership passes to the agency at the point of origin, the agency owns the merchandise in transit. The agency would then be obligated to pay for lost or damaged shipments. There may be times when accepting a lower bid requires an agency to pay the shipping costs and accept the risk of loss for merchandise in transit. The following table summarizes commonly used shipping terms and their implications. When you see the term “Freight Allowed”, it means the seller pays the freight bill and absorbs the costs.

Terms of sale	Payment of initial freight charge	Bears final freight cost	Owens goods in transit	File claims, if any
F.O.B. destination, freight prepaid (allowed)	Seller	Seller	Seller	Seller
F.O.B. destination, freight collect		Buyer	Seller	Seller
F.O.B. destination, freight prepaid and added (charged back to buyer on invoice)	Seller	Buyer	Seller	Seller
F.O.B. shipping point, freight prepaid	Seller	Seller	Buyer	Buyer
F.O.B. shipping point, freight collect		Buyer	Buyer	Buyer
F.O.B. shipping point, freight prepaid and added (charged back to buyer on invoice)	Seller	Buyer	Buyer	Buyer

10.19 Used equipment

Used equipment can be a viable source of technology provided it is certified acceptable for manufacturer’s maintenance. All such costs for certification must be borne by the seller and must be included in the bid or proposal pricing. The same VITA review and approval that applies to new IT equipment (refer to chapter 1 of this manual) also applies to used IT equipment.

10.20 Evaluation products and testing

Evaluation products may be requested to verify quality levels or to test equipment to determine conformance with the specifications stipulated in a solicitation and/or to

determine ability to interface with existing equipment. Evaluation products may only be requested when conducting a formal solicitation. A request for an evaluation product must be clearly indicated in the solicitation. Return of evaluation products submitted will be at supplier's risk and expense. Evaluation products required in a bid or proposal must be submitted prior to the solicitation due date. Failure to submit requested evaluation products may result in rejection of bid or proposal. Evaluation products should be properly labeled, stored and controlled by the receiving public body until no longer needed. All evaluation products submitted are subject to testing. Those not destroyed during testing may be returned at the bidder's or offeror's expense. Evaluation products of the successful supplier may be held for comparison with deliveries.

If, after 30 days, the evaluation products have not been picked up and suppliers fail to provide disposition instructions, evaluation products may be offered to other agencies or internal operating departments for use. Evaluation products not picked up by bidder within 30 days of award will become the property of the Commonwealth. If the items have significant reusable utility value, they should be disposed of using established property disposal procedures. The procurement file must be documented as to disposition of all evaluation products.

10.21 Guarantees and warranties

The following guidelines should be taken into account when deciding the appropriate warranty or guarantee terms and conditions to include in IT solicitations and the final negotiated contract:

- Determine if procuring agency wants to specify the length of time the warranty is to run;
- Determine if warranty is needed to prevent damage to existing resource information from computer viruses or shut down devices;
- Select the guarantee or warranty special term and condition that best suits the needs of the agency for the particular solicitation; and
- When considering a non-industry standard warranty, the agency should obtain the appropriate cost associated with the desired warranty; a written justification for the desired warranty and any additional cost to be included in the procurement file.

Many IT suppliers will agree to provide greater than 90-day warranty periods during negotiation. Computer-off-the-shelf manufacturers generally offer 30 or 60 day warranty periods. Larger IT companies often provide 90-day warranty periods. Agencies should not have to reimburse a supplier for errors corrected or fixes made during a warranty period. The warranty period should start after final acceptance by the agency, while any procured annual maintenance or support would begin once the warranty period is over. Refer to chapter 25 of this manual, IT Contract Formation ([insert link](#)), for a more in-depth discussion of warranties.

10.22 Procurements which require FCC licensing

All facilities, equipment and services that require Federal Communications Commission (FCC) licensing (e.g., uplinks, television and radio broadcast frequencies, microwave, two-way radio), etc., are the responsibility of VITA to coordinate and acquire. All state agencies, whether in scope or not, must submit all supporting documentation to the agency or institution's assigned agency telecomm coordinator (ATC) or submit a request through VCCC prior to any acquisition of telecommunications equipment or service. There is no dollar amount associated with this requirement. Any device requiring FCC authorization or licensing must be approved by VITA. If the equipment or services are on a current VITA state contract, VITA will approve the procurement and return the request with the appropriate written approval. If the equipment or services are not currently available

through an existing contract process, VITA will acquire the requested goods or services on behalf of the requesting agency or institution.

10.23 Unsolicited proposals

VITA encourages its suppliers to submit new and innovative technology ideas by submitting unsolicited proposals. The submission of these proposals allows for VITA to consider unique and innovative ideas or approaches that have been developed in the private sector and to bring those innovations into state government. Any supplier who is considering submitting an unsolicited proposal to VITA for IT and telecommunications should adhere to the following rules:

- The IT idea or concept being proposed must be innovative and unique.
- The technology concept or idea must be independently originated and developed by the offeror submitting the unsolicited proposal.
- All unsolicited proposals must be prepared without Commonwealth assistance, endorsement, direction or involvement.
- The unsolicited proposal must include sufficient detail to permit a determination if it would be worthwhile for the Commonwealth to study and/or consider.
- The unsolicited proposal cannot be an advance proposal for a known agency or Commonwealth requirement that can be acquired through competitive methods. The proposal should not address a previously published agency requirement or need.
- All solicited and unsolicited proposals and all solicited and unsolicited ideas for innovation or improvement are submitted at the risk of and expense of the offeror, and create no financial or legal obligation on the part of the Commonwealth.
- Any ideas or information contained in an unsolicited proposal may be used freely by the Commonwealth and no restriction on the Commonwealth's use of such ideas, proposals or the information contained therein shall arise in connection with such submission.
- A favorable comprehensive evaluation of an unsolicited proposal by VITA does not, in itself; justify awarding a contract without providing for competition. No preference shall be given to any offeror that initially offered the unsolicited proposal. If it is determined by the evaluation that goods or services required by the agency and offered in an unsolicited written proposal are practicably available from only one source, a buyer may negotiate and award a contract following the VITA's sole source procedures. The buyer shall post a notice of award for ten (10) calendar days.

All unsolicited proposals for IT and telecommunications are submitted to VITA with the following proviso(s):

- All unsolicited proposals are submitted at the risk of and expense of the offeror and with no obligation on the part of the VITA or the Commonwealth.
- Unsolicited proposals must contain no restrictions on the Commonwealth's or VITA's use of any ideas, proposals or the information contained in such proposals.
- VITA may charge a fee for review of an unsolicited proposal.
- A minimum fee of \$1,000 (or greater) may be charged for review of unsolicited proposals under a specified amount (\$50,000) and an increased fee schedule over that amount. Proposals requiring technical review would be billed on an hourly basis as appropriate for time spent in review.
- All unsolicited proposals will be evaluated for their participation and encouragement of small businesses including women and minority-owned businesses and businesses owned by service-disabled veterans.

Unsolicited proposals shall be submitted in writing directly to VITA's Supply Chain Management Division at scminfo@vita.virginia.gov. Favorable evaluation by VITA or the

Commonwealth of an unsolicited proposal does not in itself justify procurement or awarding a contract without VITA first putting out the proposal for competition and providing for competitive negotiation or competitive sealed bidding, as required.

10.24 Use of brand names

Use of a brand name or equal specification should only be used to indicate a desired quality level and should be based upon one or more supplier's commodity description(s), model number(s) and quality level. The supplier's commodity numbers should be easily identifiable in a current publication that is available to most suppliers. Commodity descriptions must be sufficiently detailed and specify only the required features needed. As provided in [§2.2-4315](#) of the *Code of Virginia*, "Unless otherwise provided in the Invitation to Bid, the name of a certain brand, make or manufacturer shall not restrict bidders to the specific brand, make or manufacturer named and shall be deemed to convey the general style, type, character, and quality of the article desired. Any article that the public body in its sole discretion determines to be the equal of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted."

10.25 Supplier advertising prohibition

Without the express written consent of VITA, IT suppliers are prohibited from advertising or utilizing sales material which states that a Commonwealth agency or institution has purchased a supplier's IT product or service.

10.26 Public-Private Education Facilities and Infrastructure Act (PPEA)

The PPEA allows VITA to develop innovative public-private partnerships with its suppliers through solicited and unsolicited proposals for projects for which VITA determines there is a public need. The Public-Private Education Facilities and Infrastructure Act of 2002, [§56-575.1](#) et seq. of the *Code of Virginia* (the "PPEA") allows VITA to create public-private partnerships for the development of a wide range of projects for public use if VITA determines the project serves a public purpose and that private involvement may provide the project in a timely or cost-effective fashion. The PPEA serves as an alternative procurement method for IT in certain circumstances.

The PPEA is designed to bring private funding and/or private risk to public projects in the Commonwealth. The PPEA is intended to provide a faster mechanism for the funding and completion of projects that are time sensitive. Like the Public Private Transportation Act, the PPEA allows for creative financing and allows private entities to bring innovative thinking and vision to public projects.

The PPEA authorizes responsible public entities to use the PPEA procurement process. These entities include state agencies, public educational institutions, counties, cities and town and public authorities.

In order for a project to be eligible under the PPEA, it must meet the definition of a qualifying project. For IT, the PPEA establishes the following as qualifying projects: ". . .(vi) technology infrastructure, services and applications, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services; (vii) any services designed to increase productivity or efficiency through the direct or indirect use of technology, (viii) any technology, equipment, or infrastructure designed to deploy wireless broadband services to schools, businesses, or residential areas. . ." ([§56-575.1](#) of the *Code of Virginia*) The PPEA establishes requirements for the review and approval of proposals received pursuant to the PPEA. In addition, the PPEA specifies the criteria that must be used

to select a proposal and the contents of any comprehensive agreement between VITA and the private entity.

10.26.1 PPEA process

The PPEA process can be initiated in two ways. An agency may issue a solicitation for PPEA proposals, like a traditional RFP, or an agency may receive an unsolicited proposal (see subsection 10.23 above) where a private entity submits a proposal not in response to a solicitation or notice. When an agency is considering issuing a notice for solicited proposals, it must first make a determination that it reasonably expects the PPEA process to be more beneficial than traditional procurement processes under the VPPA. A public notice soliciting PPEA proposals must allow for at least forty-five (45) days for proposals to be submitted. Notice must be posted on eVA.

If an agency receives an unsolicited PPEA proposal, it must make a threshold decision as to whether the proposal fits with the agency's business objectives and should be pursued. If the agency decides to accept the unsolicited PPEA proposal, it must post a public notice for at least forty-five (45) days which details the subject matter of the proposal and requests that competing proposals be submitted. Notice must be posted on [eVA](#). If the agency decides not to accept the unsolicited PPEA proposal, the agency should return the proposal to the private entity.

The PPEA may be a useful tool to achieve certain objectives but it is just another procurement method. Most PPEA proposals involve costly, high profile projects so it is imperative that agencies closely follow the PPEA procurement procedures to ensure a fair competitive process.

10.26.2 Fees for proposal review

Under [§56-575.4](#), agencies may charge a reasonable fee to cover the costs of processing, reviewing and evaluating proposals and charge for reasonable attorney's fees and fees for financial, technical, and other necessary advisors or consultants. The model PPEA guidelines prescribe that there should be no fee charged by agencies for review of solicited proposals. For unsolicited proposals, agencies may charge a fee of one half of one percent of the project cost or no less than \$5,000 and no more than \$50,000. Any unused portion of a fee may be reimbursed.

10.26.3 Proposal format for submission of proposals

- **Proposal format for conceptual proposals.** Proposals shall provide a straightforward, concise delineation of capabilities, experience and approach. Elaborate brochures and/or excessive promotional materials are not required or desirable. Firms that submit proposals may be required to make an oral presentation of their proposal with participation by key personnel. All information requested in the Section VI (A) "FORMAT FOR SUBMISSION OF CONCEPTUAL PROPOSALS" must be included in any proposal submitted to VITA. In addition, all submitted proposal should also contain the following in addition to the requirements of the Model Procedures:
 - Project Characteristics:
 - Proposal should include sufficient data, analysis and information sufficient to satisfy VITA that the project would serve a public purpose as required by the PPEA.
 - Provide information about how the project is aligned with Virginia's strategic goals for technology.
 - Financing:

- Proposal must include sufficient financial information which evidences the proposer's financial stability and an ability to provide financing to support the project.
 - The financial plan for the proposed project must contain enough detail, including cost benefit and tax analysis studies, so that an analysis will reveal whether the proposed financing is feasible.
- References:
 - Each proposal should provide reference information for three to five successful relevant projects completed by the proposer.
 - References should include the following information:
 - Project owner/sponsor (business name and address)
 - Owner's project manager (name, telephone and fax numbers)
 - Project summary, budget and final cost
 - Project schedule (proposed and actual)
- Lawsuits or arbitration proceedings:
 - Each proposal should include a list and explanation of all lawsuits and arbitration proceedings during the past three years involving any of the proposing firms or any of its principles.
- **Proposal format for detailed proposals.** A detailed proposal should not depart significantly from the technical approach or financing plan described in the conceptual proposal. If a proposer departs significantly in either respect, VITA may reject the detailed proposal as non-compliant. In particular, adoption of significant aspects or characteristics of a competing conceptual proposal will normally result in disqualification and rejection of a detailed proposal. At any time during the detailed stage, VITA may ask a proposer to provide additional information, data, analysis or any other information needed to sufficiently review the project. If necessary to protect additional confidential proprietary information which may be included in the detailed proposal, VITA and the proposer will modify the previously executed agreement on protection of confidential information as needed.
- **Requirements for both conceptual and detailed proposals.** All PPEA proposals (conceptual phase and detailed phase) should follow the following format:
 - All submitted proposals shall be clearly marked as a "PPEA Proposal."
 - To be considered, one original and five (5) copies and one electronic copy of any unsolicited or solicited proposals must be submitted.
 - The applicable fee must be paid to VITA for all unsolicited proposals.
 - The cover page must include the title of the proposal, the name and address of the proposing entity, the individual authorized to act on behalf of the proposer and his or her telephone and facsimile numbers and email address.
 - An authorized representative of the firm or consortium making the proposal must sign the proposal.
 - Each proposal should include an executive summary, which includes a summary of organizational structure, size of the firm(s), brief history, and areas of expertise which qualify the firm for the work and full range of services required for the proposed project.
 - All pages of the proposal should be consecutively numbered.
 - The proposal should contain a table of contents which cross references the requirements by category.
 - Each copy of the proposal should be bound or otherwise contained in a single volume where practicable.

- All proposal documentation for which a claim of confidentiality is made should be submitted in a separately bound clearly marked volume for convenience of review by VITA and to reduce the potential for inadvertent disclosure.
- All PPEA proposals should be submitted via mail or hand delivery to:

Chief Information Officer
 C/o VITA, PPEA Proposals
 Commonwealth Enterprise Solutions Center
 11751 Meadowville Lane
 Chester, VA 23836

10.26.4 PPEA proposals and the Freedom of Information Act

Proposal documents submitted by private entities are subject to the Virginia Freedom of Information Act. In accordance with [§2.2-3705.6\(11\)](#) of the *Code of Virginia*, such documents are releasable if requested, except to the extent that they relate to (i) confidential proprietary information submitted to VITA under a promise of confidentiality or (ii) memoranda, working papers or such other records related to proposals if making public such records would adversely reflect the financing interest of VITA or the private entity or the bargaining position of either party.

[§56-575.4\(G\)](#) of the PPEA imposes an obligation on VITA and any affected local jurisdiction to protect confidential proprietary information submitted by a private entity. When the private entity requests that VITA not disclose information contained in its proposal, the private entity must (i) invoke the exclusion when the data or materials are submitted to VITA or before such submission, (ii) identify the data and materials for which protection from disclosure is sought, and (iii) state why the exclusion from disclosure is necessary. A private entity may request and receive a determination from VITA as to the anticipated scope of protection prior to submitting the proposal. VITA will not protect any portion of a proposal from disclosure if the entire proposal has been designated confidential by the proposer without reasonably differentiating between the proprietary and non-proprietary information contained therein.

10.26.5 Agreement on protection of confidential information

If VITA should decide to accept a proposal for consideration at the conceptual phase, VITA and the proposer will execute a written confidentiality agreement designating specifically what confidential proprietary information within the proposal will be excluded from public disclosure.

10.26.6 VITA's reservation of rights

In connection with any proposal or qualifying project, VITA shall have all rights available to it by law in administering the PPEA proposals that it receives, including without limitation the following:

- Right to reject any or all proposals at any time, for any reason, solely within the discretion of VITA. Proposers shall have no recourse against VITA for such rejection. Proposers will be notified in writing of such rejection.
- Terminate evaluation, review or consideration of any and all proposals at any time and reserve the right to issue an RFI or RFP for the proposed project.
- Suspend, discontinue and/or terminate comprehensive agreement negotiations with any proposer at any time before the actual authorized execution of a comprehensive agreement by all parties.
- Negotiate with a proposer without being bound by any provision in its proposal.

- Decline to return any fee required to be paid by proposers hereunder, except for initial fees paid by proposers with an unsolicited conceptual proposal where VITA declines to accept the proposal for consideration.
- Request revisions to conceptual or detailed proposals at any time during the conceptual or detailed review stages.
- Submit a proposal for review by outside consultants or advisors selected by VITA without notice to the proposer. Such consultants or advisors shall be contractually required to be bound by the agreement on protection of confidential information between the proposer and VITA.

VITA recognizes that it may receive proposals, which have certain characteristics in common yet differ in meaningful ways. In such cases, VITA reserves the right, in its sole discretion, to treat such a proposal or any portion of such proposal received after the original proposal, as either a competing proposal or a noncompeting unsolicited proposal, and to proceed accordingly.

10.26.7 Additional VITA provisions

Under no circumstances shall VITA be liable for, or reimburse any cost incurred by a proposer, whether or not selected for negotiations, in developing a proposal, submitting additional requested information to VITA or in negotiating a comprehensive agreement. Any and all information VITA makes available to proposers shall be as a convenience to the proposer and without representation or warranty of any kind. Proposers may not rely upon any oral responses to inquiries. If a proposer has a question or needs clarification on any matter during the PPEA process, the proposer must submit the question in writing and VITA will respond in writing as it deems appropriate.

10.26.8 When is a similar proposal a competing proposal?

In the event a potential proposer is unsure whether its planned proposal will be sufficiently similar to the proposal which was the subject of a notice to be deemed a competing proposal, such proposer may submit to VITA a written request for a preliminary determination of whether its project would be deemed a competing proposal in whole or in part. VITA will respond to such request with a preliminary determination as to whether or not the proposal would be a competing proposal or that it has received insufficient information to make a determination. In the event VITA elects to treat a proposal, or part of a proposal, received within the posting period as a noncompeting proposal, VITA will follow the forty-five (45) day posting period (or longer depending on the scope and complexity of the proposed project) to permit competing proposals to be submitted, including from the proposer whose proposal triggered the original notice.

10.26.9 PPEA proposal steps

For unsolicited PPEA proposals, VITA will follow the steps shown in the table below:

Phase	Step	Activity
CONCEPTUAL PHASE	1.	Initial review of unsolicited conceptual proposal.
	2.	Payment of initial review fee.
	3.	Negotiation of agreement on protection of confidential proprietary information.
	4.	Posting of notice of acceptance of unsolicited conceptual proposal and invitation for competing proposals.
	5.	Balance of review fees paid.
	6.	Conceptual proposals – initial review – internal review committee

		established - includes staff from DGS and Treasury, other agencies as needed.
	7.	After review, agency decides to 1) stop process and return all proposals; 2) move one proposal to the detailed phase; or, 3) move two or more proposals to the detailed phase.
		Responsible Cabinet Secretary must make a determination, in writing that proceeding with the PPEA is in the public interest as opposed to using traditional procurement methods under the VPPA. Cabinet Secretary must determine that PPEA provides a public benefit due to scope, complexity or urgency of project or the existence of risk sharing, added value, funding, or economic benefits not otherwise available to the public entity.
		Cabinet Secretary provides Secretaries of Finance and Administration with copies of review committee's recommendation and allows them to comment.
		Cabinet Secretary can request further information, agree with agency recommendation, agree with recommendation with conditions, or disagree with agency recommendation and direct agency accordingly.
DETAILED PHASE	7.	VITA approves and selects proposal(s) for detailed proposal submission.
	8.	Detailed proposal preparation and submission by proposers.
	9.	Written agreement on protection of confidential proprietary information for additional information submitted in the detailed phase.
	10.	Detailed proposal – review by VITA/Secretary of Technology.
	11.	Affected local jurisdictions considered.
	12.	Project selection.
	13.	Negotiation of comprehensive agreement – Agency can still terminate process or negotiations with proposer and seek approval from Cabinet Secretary to enter into negotiations with another proposer(s).
	14.	Governor and General Assembly approve.

10.26.10 Applicability of other laws

Virginia's constitutional and federal and state statutory requirements governing appropriation and expenditure of public funds apply to any comprehensive agreement entered into between VITA and any proposer under the PPEA. Accordingly, the processes and procedural requirements associated with the expenditure or obligation of public funds by VITA shall be incorporated into any PPEA proposal.

Although the VPPA (§2.2-4300 et seq. of the *Code of Virginia*) does not apply to qualifying projects submitted pursuant to the PPEA, the requirements of state and federal appropriations acts do apply wherever appropriated funds will be involved in the financing of a qualifying project. Proposals incorporating the use of state and/or federal funds should address how those proposals are consistent with the legal restrictions imposed in appropriations acts.